

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~592~~ 178

JOHN MILLER, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 25, 1912.

(23,034)

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In the United States Court of Claims.

Number 30790.

JOHN MILLER
vs.
THE UNITED STATES.

Petition.

Filed Jan. 4, 1911.

To the Chief Justice and Judges of the Court of Claims:

Your petitioner represents as follows:

1. Petitioner is a resident of the Territory of Alaska and is a citizen of the United States.

2. September 15, 1905, the United States advertised for proposals to carry the mails, as follows:

"78108 from Valdez. By Tonsina, Copper Center, Gulkana (n. o.), Gakona (n. o.), Christochina (n. o.), Mentasta (n. o.), Tanana Crossing (n. o.), Ketchumstock (n. o.), Chicken, Franklin, and Jackwade, to Eagle 428 miles and back, once a week, from November 1 to April 30, and twice a month from May 1 to October 31 in each year, in close connection at Valdez, with steamers to and from Seattle, Wash. Any class of mail to be carried that the Department may elect, but the total weight not to exceed 600 pounds a single trip each way.

2

November 1 to April 30.

Leave Valdez Monday of every week;
Arrive at Eagle in 14 days;
Leave Eagle Wednesday of every week;
Arrive at Valdez in 14 days.

May 1 to October 31.

Leave Valdez twice a month, about the 1st and 15th of each month;
Arrive at Eagle in 14 days;
Leave Eagle twice a month, about the 15th and 30th of each month;
Arrive at Valdez in 14 days.
Bond required with bid, \$60,000."

Other material parts of that advertisement are as follows:

"The Postmaster-General may order an increase of service on a route by allowing therefor not to exceed a pro rata increase on the contract pay. He may change schedules of departures and arrivals in all cases, and particularly to make them conform to connections

with railroads, without increase of pay, provided the running time be not abridged. The Postmaster-General may also discontinue, change, or curtail the service in order to place on the route superior service, or whenever the public interest, in his judgment, shall require such discontinuance, change, or curtailment for any other cause, he allowing as full indemnity to contractor one month's extra pay on the amount of service dispensed with, and not to exceed pro rata compensation for the amount of service retained and continued; but the Postmaster-General reserves the right to rescind any acceptance of a proposal at any time before the signing on behalf of the United States of the formal contract, without the allowance of any indemnity to the accepted bidder."

3 3. John R. Crittenden submitted a proposal, under the above advertisement, for the carrying of the mails on the route above described for \$46,000 per annum. The advertisement and proposal were prepared and published by the government, and Crittenden and petitioner had nothing to do with the preparation and publication thereof.

4. The proposal of Crittenden was accepted, and thereafter a written contract was signed and executed by all the parties, a copy of which, omitting the attestation clause and signatures, is as follows:

"This article of contract, Made the first day of February, nineteen hundred and six, between the United States of America (acting in this behalf by the Postmaster General) and John R. Crittenden, contractor, and John Miller, of Valdez, Alaska, and Charles H. Kraemer, of Valdez, Alaska, as his sureties:

Witnesseth, That whereas John R. Crittenden, has been accepted, according to law, as contractor for transporting the mail on Route No. 78108, from Valdez by Tonsina, Copper Center, Gulkana, (n. o.), Gakona (n. o.), Christochina (n. o.), Mentasta (n. o.) Tanana Crossing (n. o.), Ketchumstock (n. o.), Chicken, Franklin and Jackwade, Alaska, to Eagle, Alaska, and back, once a week from November 1 to April 30, and twice a month from May 1 to October 31 in each year, in close connection at Valdez with steamers to and from Seattle, Wash., any class of mail to be carried that the Department may elect, but the total weight not to exceed 600 pounds a single trip each way, at the rate of Forty six thousand dollars per annum, for and during the term beginning the first day of July, nineteen hundred and six, and ending June thirty, nineteen hundred and ten. Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

1st. To carry said mail with certainty, celerity, and security, using therefor such means as may be necessary to transport the whole of said mail, whatever may be its size, weight, or increase, during the term of this contract, and by the schedule of departures and arrivals stated in the advertisement under which this contract is made, and within the running time fixed therein; and so to carry until said schedule is altered by the authority of the Postmaster General of the United States, as hereinafter provided, and then to carry according

to such altered schedule; (Provided, That when more than ten minutes are taken for opening and closing the mails at any office, the additional time so taken is to be allowed in addition to the time fixed in said schedule); and in all cases to carry said mail in preference to passengers and freight, and to their entire exclusion if its weight, bulk, or safety shall so require; and to carry the mail, upon demand, by any conveyance which said contractor regularly runs, or is concerned in running, on the route, beyond the number of trips above specified, in the same manner and subject to the same regulations as are herein provided touching regular trips.

2d. To carry the mail in a safe and secure manner, if in a vessel, and to be similarly protected, free from wet or other injury, under a sufficient rubber, oilcloth, or canvas if carried on a horse, and in a boot or covered receptacle under the driver's seat if carried in a coach or other vehicle.

3d. To take the mail and every part thereof from, and deliver it and every part thereof at, each post office on the route, or that may hereafter be established on the route (or on any route that may hereafter be established, and to which this contract may be extended, as hereinafter provided), and into the post office at each end of the route, and into the post office, if one is there kept, at the place

5 at which the carrier stops for the night; and if no post office is there kept, to lock it up in some secure place, at the risk of the contractor.

4th. To take any mail matter or private mail satchels that may be tendered outside of the usual mail bag from any post office now on the route, or that may hereafter be established on the route, and carry the same to, and deposit into the proper boxes, or hang the mail satchels on the proper mail cranes, now on or that may hereafter be placed on the line of the route for this purpose (or on any route that may hereafter be established and to which this contract may be extended as hereinafter provided), when requested so to do; also to collect the mail from the boxes (when a signal is displayed to indicate that a box contains mail to be taken) and to deposit the same in the next post office at which the carrier arrives, and to take the mail satchels when they are used, either with or without mail, from the mail cranes and carry them to the post office as contemplated by the terms of the advertisement pursuant to which this contract is made.

5th. To be accountable and answerable in damages for the person to whom the said contractor shall commit the care and transportation of the mail, and his careful and faithful performance of the obligations assumed herein, and those imposed by law; not to commit the care or transportation of the mail to any person under sixteen years of age, nor to any person who has not sufficient intelligence to properly handle and deposit the mail for boxes along the route; nor to any person not authorized by law to be concerned in contracts for carrying the mails; to discharge any carrier of said mail whenever required so to do by the Postmaster General; not to transmit, by themselves, or either of them, or either of their agents, or be concerned in transmitting, commercial intelligence more rapidly than

by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail, or convey or transport any person engaged in carrying letters, packets, or newspapers which should go by mail; to carry post-office blanks, mail locks and bags, and other postal supplies, and also the Post Office inspectors and other special agents of the Post Office Department on the exhibition of their credentials, if a coach or other suitable conveyance is used, without additional charge.

For which services, when performed, and evidence thereof shall have been filed with the Postmaster General, the said contractor is to be paid by the United States at the rate per annum hereinbefore named; payments to be made monthly, and as soon after the close of each month as accounts can be adjusted and settled; said pay to be subject, however, to be reduced or discontinued by the Postmaster General, as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, by allowing not to exceed a pro rata increase of compensation for any additional service thereby required; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and not to exceed a pro rata compensation for the service retained; but no increase of compensation shall be allowed for a change of service not amounting to an increase, nor indemnity of month's extra pay for any change of service not involving a decrease of service.

It is hereby also stipulated and agreed by the said contractor and his sureties that whenever, in the opinion of the Postmaster General, it shall become necessary to increase the speed upon which the mail is carried, the service shall be readvertised for the reduced running time required: Provided, that the contractor, with the consent of his sureties, shall, subject to all the conditions hereinbefore and hereinafter stipulated, have the option of continuing service upon the expedited running time without additional compensation therefor; and in case the contractor, with the consent of his sureties, shall have signified his desire to continue the service upon the reduced running time, and an order shall have been made in pursuance thereof, he shall, if required by the Postmaster General, perform the expedited service, subject to all the conditions hereinbefore and hereinafter stipulated, until the termination of his contract in like manner as if such expedited service had been the original covenant.

It is hereby also stipulated and agreed by the said contractor and his sureties as aforesaid that he shall forfeit—

1st. The pay of a trip when it is not run, and in addition, if no sufficient excuse for the failure is furnished, an amount not more than three times the pay of the trip.

2nd. At least one-fourth of the pay of a trip when the running is

so far behind time as to fail to make connection with a depending mail.

3d. For violating any of the foregoing provisions touching the transmission of commercial intelligence more rapidly than by mail; or giving preference to passengers or freight over the mail or any portion thereof, or for leaving the same for their accommodation; or carrying, otherwise than in the mail, matter which should go by mail; or transporting persons engaged in so doing, with knowledge thereof, a penalty not to exceed a quarter's pay.

4th. For the loss of, or depredation upon, a mail pouch in the custody of a contractor, a penalty in a sum not to exceed one and one-fourth times the value of the contents lost thereby: Provided, that the loss is occasioned by the fault of the contractor or his agent.

5th. For violating any other provision of this contract touching the carriage of the mails, or the time and manner thereof, without a satisfactory explanation of the delinquency, in due time, to the Postmaster General, a penalty in his discretion. That these forfeitures may be increased into penalties of a higher amount, in the discretion of the Postmaster General, according to the nature or frequency of the failure and the importance of the mail:

8 Provided, that, except as herein otherwise specified, and except as provided by law, no penalty shall exceed three times the pay of a trip in each case.

And it is hereby further stipulated and agreed by the said contractor and his sureties that the Postmaster General may annul the contract or impose forfeitures in his discretion for repeated failures or for failure to perform service according to contract; for violating the postal laws or regulations; for disobeying the instructions of the Post Office Department; for refusing to discharge a carrier, or any other person having charge of the mail by the contractor's direction, when required by the Department; for subletting service without the consent of the Postmaster General, or assigning or transferring this contract; for combining to prevent others from bidding for the performance of postal service; for transmitting commercial intelligence or matter which should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; or for the failure of the contractor to give his personal supervision to the performance of the service, and to reside upon or contiguous to the route; that the Postmaster General may annul the contract, whenever the contractor shall become a postmaster, assistant Postmaster, or member of Congress, or otherwise legally incompetent to be concerned in such contract; and whenever, in the opinion of the Postmaster General, the service can not be safely continued, the revenues collected, or the laws maintained on the road or roads herein.

And it is hereby further stipulated and agreed by the said contractor and his sureties—

1st. That such annulment shall not impair the right to claim damages from said contractor and his sureties under this contract, but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise,

be assessed and liquidated by the Auditor for the Post Office Department.

9 2d. That, within the meaning of this contract, foreign mails in transit across the territory of the United States shall be deemed and taken to be mails of the United States.

3d. That this contract may, in the discretion of the Postmaster General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or other contractors shall be made by the Postmaster General.

4th. That no member of or delegate to Congress shall be admitted any share or part of this contract or agreement, or to any benefit to arise therefrom.

5th. That this contract is further to be subject to all the conditions imposed by law, and by the several acts of Congress relating to post offices and post roads, and to the conditions stated in the pamphlet advertisement of September 15, 1905."

The form of contract was prepared and provided by the Government for signature, and Crittenden and petitioner had nothing to do with such preparation.

5. For many years the regulations adopted and enforced by the Post Office Department have authorized the Postmaster General to discontinue or curtail the service, in whole or in part, in order to secure a "better degree of service" or "superior service," or whenever the public interest, in his judgment, should require such discontinuance or curtailment for any other cause; he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and pro rata compensation for the amount of service retained and continued. Prior to 1874, and afterwards, regulation 263 contained the following language:

The Postmaster-General may also discontinue or curtail
10 the service, in whole or in part, in order to place on the route a greater degree of service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause; he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a pro-rata compensation for the amount of service retained and continued.

That regulation in substance, and almost in the same language, stood until prior to 1893, but it was amended, as section 817, to read as follows:

The Postmaster General may discontinue or curtail the service on any route, in whole or in part, in order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor one month's extra pay on the amount of service dispensed with, and a pro-rata compensation for the amount of service retained and continued.

Subsequently to 1893 it was slightly amended, and it reads as follows:

SEC. 1277. The Postmaster-General may discontinue or curtail the service on any mail route, in whole or in part in order to place

on the route superior service, or whenever the public interest, in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor, one month's extra pay, on the amount of service dispensed with, and a pro rata compensation for the amount of service retained and continued.

11 The regulation, whatever its language or its number, was not drawn and promulgated with reference to the conditions existing in Alaska on Route No. 78108 during the period covered by the contract sued on, but it was drawn and promulgated with reference to conditions existing within the limits of the United States and exclusive of that route in Alaska, and particularly without reference to the hereafter described conditions existing in that part of Alaska covered by the contract sued on.

In the preparation of the forms of advertisement, proposal and contract in suit, the government officials adopted the regulation in force, and such advertisement, proposal and contract were drawn and printed for general use, and the proposal and contract were presented for execution, without particular regard to the physical, climatic, or other conditions then existing or that might exist along the line of that route during the contract period of four years. At the execution of the proposal and contract, and of the subsequent contract of subletting, Crittenden and petitioner did not think or believe that the contract in suit would be discontinued or terminated in any manner or form, but on the contrary, they believed that the contract in suit would be in full force and effect during the whole contract period, and they named the amount of annual compensation in that belief. They expected that they would encounter losses of profits in a portion of the contract period, but would earn good profits before the contract period ended and for the whole contract period. Had Crittenden and the petitioner believed otherwise than as above stated, they would not have executed either of the contracts for that annual compensation, nor would petitioner have made the arrangements and expenditures in the early part of 1903.

12 hereinafter described. On the contrary, petitioner made such arrangements and expenditures in the belief that the contract would be in force for the full contract period. Petitioner avers that if the government had asked bids for a two year contract on that route Crittenden would not have submitted a bid at all, and petitioner would not have become surety on any contract for less than \$92,000 per annum, because the conditions were such that the expenses of carrying the mails on the route would be far heavier for carrying them in 1906 than in 1907, and in 1907 than in 1908, and in 1908 than in 1909. As an illustration, the petitioner avers that it cost, to-wit: \$151,169.55 to perform the contract until it was discontinued by order of the Postmaster General, that amount being to-wit: \$48,595.08 more than the total sum received from the government, but it would only have cost him, to wit: \$43,390 to perform the contract for the remaining twenty-two months of the contract period, during which time he would have received, to-wit: \$84,326.00 for carrying the mails, a profit of, to wit: \$40,936.

6. It soon developed that Crittenden was not able to command the capital needed in the performance of the contract, and therefore petitioner was obliged to and did expend the money needed to buy harness, sleds, horse-feed, horses and dogs to carry the mails, and by July 1, 1906, the contractor, and petitioner, as his surety, were ready to begin performance of the contract, and the contract was performed to the satisfaction of the government until the service was arbitrarily, capriciously, and erroneously discontinued by the Postmaster General, notwithstanding the conditions that existed during all the period covered by the contract, as hereinafter set forth.

13 7. Afterwards, petitioner and the said Crittenden entered into a contract of subletting, the material parts of which, omitting signatures, are as follows:

"This article of contract, made the 1st day of May, nineteen hundred and eight, between John R. Crittenden, of Valdez, Territory of Alaska, contractor with the United States, party (or parties) of the first part, and John Miller, of Valdez, Territory of Alaska, subcontractor, party (or parties) of the second part, and ——— of ———, his sureties:

Witnesseth, that whereas the said party (or parties) of the first part has executed a contract with the United States (acting in this behalf by the Postmaster General), according to law, for transporting the mail on Route No. 78108, from Valdez, Territory of Alaska, to Eagle, Territory of Alaska, and back twice a month from May 1st to Oct. 31st in each year and one times a week from Nov. 1st to April 30th in each year from July 1st, 1906, to June 30, 1910, on the schedule prescribed by the Post Office Department, and having obtained conditional permission to sublet the same, has made the following agreement with the said party (or parties) of the second part, to wit:

That said party (or parties) of the second part, and his sureties aforesaid, do jointly and severally undertake, covenant, and agree, and do bind themselves and each of them to and with the said party (or parties) of the first part in the sum of — dollars, to transport the United States Mail on the said Route No. 78108, from Valdez, Territory of Alaska, by Copper Center, Gulkana (n. o.) Kokomo (n. o.), Chistochina (n. o.) Mentasta (n. o.), Tanana Crossing (n. o.), Ketchumstock (n. o.) Chicken, Franklin and Jackwade ——— to Eagle, Territory of Alaska, and back (including the depositing and collecting of mail along the route, as provided by the advertisement)

14 twice a month from May 1st to Oct. 31st in each year and one times a week, from the 1st day of November, to April 30 in each year, from the 1st day of May, 1908, to the 30th day of June, 1910, inclusive, on such schedule as the Postmaster General may direct, and in full compliance with the postal laws and regulations, and subject to all the requirements of the said party of the first part under the said contract with the United States, for forty-six thousand dollars per annum, or for the annual rate of pay set opposite the number of round trips that may be ordered by the Postmaster General to be performed during the period of this subcontract, as follows:

One round trip per week — dollars per annum.

Two round trips per week — dollars per annum.

Three round trips per week — dollars per annum.

Six round trips per week — dollars per annum.

Seven round trips per week — dollars per annum.

Twelve round trips per week — dollars per annum.

Fifteen round trips per week — dollars per annum.

Eighteen round trips per week — dollars per annum.

Twenty-four round trips per week — dollars per annum.

— round trips per week — dollars per annum.

And it is hereby further agreed that liability for all fines and deductions imposed upon a party of the first part by the Postmaster General, for failures and delinquencies in the performance of service under his contract, shall be assumed and borne by the party of the second part, and, if necessary, the Auditor for the Post Office Department may enforce this agreement by proper deductions from any compensation due the party of the second part for service performed under this subcontract.

And it is hereby further agreed that for any additional service required by the Postmaster General, and not hereinbefore expressly stipulated, the party of the second part shall be allowed not to exceed a pro rata increase of compensation; and, in case of decrease,

15 curtailment, or discontinuance of service, as full indemnity, a pro rata of the one month's extra pay allowed by the United States to the party of the first part, and, unless previously herein stipulated, not to exceed a pro rata compensation for the service retained.

And it is hereby further agreed that in case of failure or refusal by the party of the second part to perform the mail service herein provided for, then the sum hereinbefore stipulated shall become immediately due to the party of the first part as liquidated damages and not as a penalty, and, in default of payment thereof, may be recovered in an action of debt.

To the faithful performance of each and every covenant, and agreement hereinbefore mentioned the parties do bind themselves, and each of them, and their heirs and personal representatives, and in testimony thereof do hereunto set their hands and seals, the day and year set opposite their respective names."

That contract of subletting was prepared and printed by the United States as a form long in general use, and petitioner and Crittenden had nothing to do with its preparation. It was executed by the parties to it, with the written consent of the Postmaster General, and a copy was filed with the Second Assistant Postmaster General who notified the Auditor for the Post Office Department of the fact of the filing in his office of such contract, all in conformity with the Act of May 17, 1878, sec. 2, 3, (20 Stat. 61, 62) and sec. 1300 of the Regulations of the Post Office Department, edition of 1902. At the time this contract was executed petitioner believed that it and the original contract would be in full force the entire period covered by the latter, and he executed that subcontract in that belief.

16 8. When it developed that Crittenden was not able to command the capital needed in the performance of the contract, as before stated, petitioner entered into a contract with Crittenden by which he agreed to and did advance Fifteen thousand dollars for the first year's supplies, and thereafter he entered into a co-partnership relation with Crittenden, in order that petitioner might be protected and the contract with the government be duly performed. That relation existed until it was dissolved, by mutual consent by an instrument in writing dated February 15, 1908, by which writing Crittenden agreed and contracted that petitioner should have and retain all moneys due or to become due from the United States on account of the mail contract dated February 1, 1906, hereinbefore set forth, but the relation of principal and surety did not cease to exist then or afterwards. By the Fall of 1905, petitioner had expended in the purchase of horses, harness, sleds, horse-feed, and dogs, more than Twenty thousand dollars before any payments were made by the United States, and during the life of the contract he furnished all the money needed and used in its performance.

9. The existing conditions in that region made it extremely difficult and hazardous to property, human life and limb, in performing the contract for the carrying of the mails on the route described and within the time specified. In many places there were no trails; horses and men could use the government trails but seldom because of their bad condition. Carriers had to push through timber and brush the best they could for many miles. Often the packs were pulled off the horses by timber and other obstacles, and the carriers would have to unpack the mails, get the horses up and pack the mails on them again. Men and horses had to walk 15 to 20 hours a day to make the regular runs. Gulkana, Kokana, Chistochina, Indian Creek, Ahtell, Slana, Little Tokio, 17 and Big Tokio Rivers were without bridges, and all were hard and dangerous to cross, both to animals and men, because of the difficult shores and the ice running in the rivers. The same trail could be used seldom two trips in succession. Because of the water which flooded the rivers, carriers would have to take to the timber and cut trails so as to avoid the water, for neither animals nor men could stand it to wade through those overflows when the thermometer was ranging from forty to sixty degrees below zero, thus increasing the mileage to be travelled in making the service. In other portions of the route the trails pass through thickly wooded and brushy country, where narrow pack trails had been cut which were almost impassable for sleds. The depth of the snow ranged from 6 inches to 24 inches at each snowfall, and when the new snow did not interfere with travel the wind would cause it to fill up the trails and make the latter more difficult than before. The Little Tokio River was hard to cross because it was fed by warm springs which caused the river to open up frequently. The river is very deep and, when covered with a heavy fall of snow, is exceedingly treacherous. The Big Tokio is a glacier stream, and it is constantly covered with water during the winter months, overflowing out into the timber for half

a mile on either side. Often the carriers had to go through that water. During the freeze-up in the Fall and the break-up in the Spring it was very difficult to carry the mail across the Big Tokio without losing it or getting it wet. Many trips the carriers would labor and travel from 18 to 20 hours in succession and only make 6 or 7 miles distance, owing to the snow or the water, or both.

18 Every effort was made to supply the men and beasts with food, but the physical conditions of the country and the climatic difficulties were such that the men and animals often suffered great hardships. At one time petitioner and six of his men, while in the Tickhel Valley, ran out of food and their necessities were such that they took and ate flesh from a horse that had been shot because it was freezing to death, and petitioner and his men ate that flesh for their Thanksgiving eve supper and Thanksgiving Day dinner. Petitioner's hand and feet were frozen at the time and they were 65 miles from camp. At another time petitioner went over the route in March and April, 1908, to supervise the work of carrying the mails. From Gulkana to Chistochina, 40 miles, his horse had to break a new trail and was 18 hours in doing so. Most of this was night work. From Chistochina to Boulder Creek the trail was snow-drifted for 31 miles. A deep snow was falling and it took 17 hours and 40 minutes to make the trip. Here he met other carriers and they left Boulder Creek at 3:30 A. M., March 22, taking the trail through to Tanana Crossing and using two dog teams. Petitioner drove one team of five dogs to Mantasta, 17 miles, in 10 hours. Then he went by horse to the Tokio Forks Cabin, arriving at 7:30 P. M., making 32 miles in 16 hours through loose snow. When crossing a little creek north of Mantasta the horse broke through the ice and its hind legs and back got wet. The water froze on the horse and petitioner had to take him into the men's cabin where he could thaw out and get dry by the heat of the stove. Petitioner left Tokio Forks Cabin, March 23, at 5 A. M. and reached Tanana Crossing at 11:30 P. M., making 39 miles in 18 hours. There was no rest

19 for man or horse. Mail that left Valdez March 9, was caught in the storm in Indian Pass and was delayed about two days. Mail Carrier Swanson was two days in getting 31 miles. He had to hire two men, and two mining men going into Chicken Creek, and they shoveled a trail through Indian Pass. They were still shoveling when petitioner found them March 21st. The trail was opened March 26, but the contractor was fined by the government because the mails were not delivered on time. Petitioner got back to Valdez April 22, having made the round trip between March 13 and April 22. This account of his journey from Valdez to Tanana Crossing and Eagle and back to Valdez is but an illustration of the difficulties that were encountered and the hardships that were endured in winter, but the other seasons of the year presented their difficulties and hardships too. On one occasion petitioner left Valdez with the mail for the first of June and helped take it through to Chistochina, he using horses and having the aid of carriers. He had to take the mail across Gulkana and Kokona Rivers in boats and the horses had to swim. Going from Kokona, they could not use the govern-

ment trail for 19 miles on account of its unfit condition, and they had to go up the side of the Copper River, cutting out a trail as they went. While ascending the Talsona River they learned from an Indian that the Talsona Bridge had been washed out and that they could not cross the stream without swimming the horses and getting the mail wet. They turned back to the mouth of the Talsona River and crossed there. They took an old trail that was cut in 1900, but it was so narrow and full of high stumps that they had to leave it and cut a way out to the government trail to the west. They were

five hours late in arriving at Chistochina, where a change of
20 horses and men was ready, and petitioner started them at once, 1:00 A. M., in an effort to make up the lost time between that point and Tanana Crossing. At that crossing it was necessary to have two stations, one on either side of the Tanana, for it was dangerous to swim the horses and therefore the mail was taken across in a boat. It was necessary to use a boat on Little Tanana River about three miles North of the Tanana River for about three months in the Spring and Summer because it was very deep. All this unpacking and repacking took valuable time, and the government never failed to assess a fine if the mail did not arrive at the designated points at the times fixed. Such difficulties and hardships as these were encountered constantly each year. The foregoing facts and physical and climatic conditions were matters of common knowledge in that part of Alaska, and were known to the agents of the Post Office Department.

10. The expense of preparation for the service under the contract, and of maintaining the service thereunder, were very great. By July 1st, 1906, Crittenden and petitioner were ready to perform the contract and had their men, dogs, horses and food along the route, and they entered on the performance of the contract promptly and well prepared. In the winter of 1906, they contracted with Scott & Frase to carry the mails from Tanana Crossing to Eagle, and the latter carried such mails until March 28, 1908. In the Spring of 1907, Crittenden and petitioner started with another year's outfit, and they put a large and complete one along the trail from Valdez to Mantasta, 215 miles, deep snow and storms making their work difficult and costly. They were then prepared to use horses all

21 the way between the points just named. In March and April,

1907, petitioner made a shipment of twenty tons of horse-feed from Fairbanks to Tanana Crossing, at 16½ cts. per pound or \$330.00 per ton, that being the lowest freight charge obtainable. In the summer of 1907, they had to cut and grade horse and sled trails so as to make good time, and they had to shorten the trail in places as the running time was fourteen days, and at some points the existing trails were so soft and swampy that the men and pack horses had to make new trails every trip. They built bridges on several creeks as well as houses for the men, stables for the horses and cache houses for feed, so that the men and horses would be protected and sheltered at night as well as fed. North of Gulkana to Tanana Crossing, the government had never done any repairs to the trail, and it ran through such swampy country that it could not be

used for mail purposes. Crittenden and petitioner had to cut a trail and grade it in some places, and build bridges south from Chistochina about 10 miles. From Chistochina Station north to Tanana Crossing they cut and graded trails, building bridges at some places, for about 105 miles. They built cabins and stables at Indian River for men and horses; and cabins, stables and cache houses at Boulder Creek, 31 miles north of Chistochina; Mantasta; Tokio Forks, 18 miles north of Mantasta; Clear Water, 17 miles north of Tokio Forks, and Tanana Crossing, on the south side. They had to put up all these houses at their own expense to protect men and stock, and it was known that one mail carrier was frozen to death, while carrying mail under a previous contract, because he did not

22 have sufficient shelter. Wherever it was necessary on the route, real estate was bought on which to put up buildings. The houses and cabins above named, were used by prospectors, the U. S. Signal Corps men, the natives, and the men who traveled in that country on the way to Athell and Nabesna mines and return. Crittenden and petitioner repaired the Talsona Bridge, in the Spring of 1907, it having been swept off its foundations and partly carried away, and horses and men could not cross the river without swimming, and in the Spring of 1908, the bridge was carried away completely. Petitioner built a bridge on the Talsona River, 17 miles south of Chistochina, so they could use it for the mails north and south bound. They improved a bridge that had been put in by the government, by raising its abutments four feet higher, anchoring it with wire, and putting it above the high waters of the spring season. That Bridge was used by everyone traveling north and south to the Chisna, Sleet Creek, and Middle Fork Mining district; and to Athell and Nabesna Mining camps, as well as by mail carriers from Gulkana to Dempsey's post office, and the Chisna mining district. The foregoing facts and conditions were matters of common knowledge in that part of Alaska, and were known to the agents of the Post Office Department. The trails, bridges, and nearly all the buildings mentioned, are on public lands, and since September 30, 1908, they have been used by the new mail contractors without compensation made to petitioner.

11. Petitioner put a large, necessary, and expensive outfit on the route for the year 1908, and the Winter and Spring of 1909, in the belief that the contract would be in force to the end of the contract period, and he took over the contract that had previously
23 been made with Scott & Frase for carrying the mails from Tanana Crossing to Eagle, in the same belief. That being done, he secured Five thousand dollars' worth of horse-feed and took it from Forty Mile Post, on the Yukon, to Steel Creek, Clarke and Franklin Gulches, and up to Chicken Creek, in the Forty Mile District, the freight costing him from 1 to 11½ cts. per pound, and took it from Chicken Creek by his own mail carriers to Taylor's Road House, Ketchumstock Station, Mitchell's, Lone Cabin Station, and from Steel Creek up to Liberty Creek Cabin, on O'Brien Creek. The first of April, 1908, petitioner put three good men in charge of the operations, paying

them good wages, two at Eagle and one at Tanana Crossing. These three men did the work that it had taken four or five men to do previously, because conditions were getting better. Petitioner had good men to do the work all along the 458 miles of route that had to be traversed, and he was able to cut down expenses greatly for the summer of 1908, and subsequently, and the business was going along nicely. About \$1,000 worth of trail and bridge work between Tanana Crossing and Eagle had been done, to shorten the winter route and give good service. It was necessary to do all these things that the contract might be performed, as the government did not make allowance for delays whether caused by snows, storms, blizzards, the freeze-up in the Fall, the break-up in the Spring, or any other consideration, but fines were charged at every opportunity.

12. August 11, 1908, the Postmaster General decided, and petitioner was notified later, that the mail service on the route should be discontinued September 30, 1908, and that he would be allowed one month's pay. If he had been informed in February, 1908,

24 that the service would be discontinued, in whole or in part, he would not have gone to the expense of putting the one year's supplies on the trail between Valdez and Eagle. Most of the horse-feed between Chistochina and Ketchumstock was lost. It had taken two years to get the trail in good condition for carrying the mails, the amount of which in that time had increased largely, for the country was settling up with ranchmen, prospectors and mining men. If the government had let the contract run the entire four year term, petitioner could have made enough money out of the performance of the contract to have recouped about all the losses sustained and herein set forth. The service was discontinued at a time when the contract had a year and nine months to run, in which time petitioner would have earned \$84,326 under the contract, and have made profits that would have reimbursed about all the losses previously sustained. In 1906 and 1907, the freight rates on supplies had cost petitioner heavily. For instance, the rates from Valdez to Chistochina were 22 cents per pound, and to Mantasta, 32 cents per pound. But in 1908 the freight rates had been reduced enormously, because the trails were improving, and the government was expending large sums of money in repairing the trail between Valdez and Gulkana, these improvements assuring good trails in the future and much lower freight charges. By the Spring of 1910, the freight rates had dropped off one-half from what they were three and four years before. As soon as the government road had been put in condition, the mail men used wagons between Valdez and Gulkana, and while it had taken six or seven horses to carry the mails by petitioner between the points named, two horses

25 hitched to a buckboard carried the same mails for the new contractors and made better time; fewer men were needed and the service cost much less than before. These conditions, and all other controllable conditions, would have been to the advantage of petitioner, and would have enabled him to recoup the loss that he had incurred up to September 30, 1908. The following is a profit

and loss statement for the period covering the actual life of the contract:

Disbursements on account of labor, feed, expenses on the route, including expenses of maintaining stations, etc.	\$110,040.03
Disbursements on account of Scott & Frase, sub-contractors	41,129.52
Total disbursements	\$151,169.55
Total receipts from the Post Office Department.....	\$102,572.41
Total losses	\$48,597.14

13. Route 78108 is from Valdez to Eagle, as before stated, and the distances are as follows: From Valdez to Tonsina is 80 miles; from Tonsina to Copper Center is 26 miles; from Copper Center to Gul-kana is 28 miles; from that point to Gakona is 4 miles; from Gakona to the junction of Chistochina and Copper river is 39 miles; from that junction to Mentasta is 50 miles; from Mentasta to Tanana Crossing is 50 miles; from that crossing to Ketchumstock is 60 miles; from that point to Chicken is 30 miles; and from that point to Eagle is 99 miles, being 466 miles in all, as against 458 miles as paid for by the government.

After August 1, 1908, and during the contract period, the following orders of, concerning, and touching the region covered by route 78108 were made and entered of record by the Postmaster General, viz:

Order B—15683, August 11, 1908, discontinued service upon route 78108, from Valdez to Eagle, effective September 30, 1908.

Order B—15685, August 11, 1908, extended service upon route 78110 from junction of the Chistochina and Copper rivers to Gakona, increasing the latter route 33 miles, and allowing the contractor for that route \$1,386.00 per annum, for that extended service.

Order B—15686, August 11, 1908, to supply Tonsina, Copper Center, and Gakona, both ways, increasing the distance 7 miles and allowing the contractor \$1,739.21 per annum.

Order B—17397, September 18, 1908, authorized emergency service between Eagle and Chicken, 99 miles and back, 3 round trips monthly, October 1 to December 31, each year, at \$199.00 per round trip; and Order B—2818, of February 16, 1909, paid John B. Powers \$1,791.00 for the 9 round trips of October 1, 10, 20; November 1, 10, 20, and December 1, 10, 20, 1908, so ordered as above and made by him, at \$199.00 for each round trip.

Order B—21552, November 27, 1908, accepted proposal of John B. Powers, at \$8,992.00 per annum, for service between Eagle and Chicken, 99 miles and back 3 times a month, 450 pounds a trip, from June 1 to September 30, and 200 pounds a trip from October 1 to May 1.

Order B—5370, March 27, 1909, authorized payment to James

27 Fish for service between Valdez and Gakona, 136 miles, from June 1 to July 15, 1909, and from Valdez to Gulkana, 132 miles, July 16 to September 30, 1909, and June 1 to 30, 1910, at \$250.00 a round trip, 3 round trips to be performed each month from June 1 to September 30, each year, summer service; and orders 21015, 21016, 21017, and 3289, paid him \$3,000.00 for 12 round trips during June 1 to September 30, 1909, 4 months, at 3 round trips each month.

Order B—19563, October 5, 1909, discontinued supply of Gakona, decreasing distance 7 miles, and decreasing pay \$1,739.31 per annum.

The mail service in the region covered by route 78108 was not discontinued except as to that part between Chicken and the junction of the Chistochina and Copper rivers, a distance of 190 miles, and in the remainder of the region covered by route 78108 mail service was continued from September 30, 1908, as is shown by the above named orders, fewer trips being made and less weights being carried, as stated. The orders named operated as a change of service only on route 78108, except as to the discontinuance of mail service between Chicken and the junction of the Chistochina and Copper rivers, as above stated. The Postmaster General did not ask petitioner to consent to any modification of the contract or to its discontinuance nor did the Postmaster General advertise that proposals would be received for changes in the terms of such contract, in accordance with section 3978, Rev. Stat. concerning changes in contracts. All the points named in those orders had been faithfully served under the terms of the contract in suit, and petitioner could and would have done and performed the contract at a profit to himself of Forty thousand nine hundred and thirty-six dollars, for the remainder of the contract period; and the performance of the contract would have enabled him, also to avoid losing the property that was lost in 1908, and 1909, as hereinbefore stated, in the sum of Five thousand eight hundred dollars, for horse-feed alone, and Five thousand dollars for buildings, which losses could and would have been avoided through and by means of the performance of the contract. On the contrary, petitioner was excluded from the performance of such service by the Postmaster General, to his great loss and damage, as aforesaid, over his objections and protests, and against his wishes and desires.

This claim nor any part thereof has — been assigned to any person or corporation and the same is the sole property of this petitioner.

There is no set-off or counterclaim in favor of the government against the petitioner; no part of the demand sued on has been paid by the United States, and there is due to the petitioner the sum of, to-wit: \$51,736.

Wherefore petitioner prays judgment against the United States for Fifty-one Thousand, Seven Hundred and Thirty-six Dollars.

DUDLEY & MICHENER,

Attorneys of Record.

LAFAYETTE PENCE,

PERRY G. MICHENER,

Counsel.

DISTRICT OF COLUMBIA, ss:

John Miller, of lawful age, being duly sworn, deposes and says that he is the petitioner in the above entitled case; that he has read the petition and understands the same, and that the matters and things in the petition set forth are true in substance demurrer was submitted.

JOHN MILLER.

Subscribed and sworn to before me, this 3rd day of January, 1911.

[SEAL.]

HERBERT L. FRANC,
Notary Public.

II. *Demurrer. Filed January 25, 1911.*

Demurrer.

Comes now the defendant by the Attorney General and demurs to the petition herein, on the ground that said petition does not state facts sufficient to constitute a cause of action against the defendant.

JOHN Q. THOMPSON,
Assistant Attorney General.
F. DE C. F.

CHAS. F. JONES,
Assistant Attorney.

III. *Argument and Submission of Demurrer.*

On the 23rd day of October, 1911 the demurrer in this case came on to be heard. Mr. Charles F. Jones was heard in support of the demurrer; Mr. Louis P. Michener was heard in opposition and the demurer was submitted.

IV. *Opinion of the Court. Filed Dec. 4, 1911.*

PEELLE, Ch. J., delivered the opinion of the court:

The defendants demur to the petition on the ground that the facts averred are not sufficient in law to constitute a cause of action.

The substantial facts are these: Pursuant to the advertisement for proposals therefor John R. Crittenden became the contractor to transport the United States mails over route 78108 from Valdez, via the stations named in the contract, to Eagle, Alaska Territory, "428 miles and back once a week from November 1 to April 30 and twice a week from May 1 to October 31 in each year" for a period of 4 years from May 1, 1906, at and for the consideration of \$46,000 per annum.

The contractor having given the required bond with the claimant

as one of his sureties entered upon the performance of the contract, and with the financial assistance of the claimant herein performed the service thereunder until May 1, 1908, when the contractor, after having obtained conditional permission therefor, sublet the contract to the claimant herein.

The contract so sublet to the claimant was as to service and compensation identical with the contract with said Crittenden and otherwise obligated the claimant to comply with the terms of said contract.

By the terms of the contract with the original contractor it was provided that "the Postmaster General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, he allowing not to exceed a pro rata increase of compensation for any additional service thereby required, and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and not to exceed a pro rata compensation for the service retained; but no increase of compensation shall be allowed for a change of service not amounting to an increase, nor indemnity of month's extra pay for any change of service not involving a decrease of service."

Section 1277 of the postal laws and regulations provides:

33 "The Postmaster General may discontinue or curtail the service on any mail route, in whole or in part, in order to place on the route superior service, or whenever the public interest, in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor one month's extra pay on the account of service dispensed with, and a pro rata compensation for the amount of service retained and continued."

Prior to the claimant's contract he had, as averred, advanced money to the contractor with which to purchase the necessary equipment and supplies, and later entered into a partnership with him to protect himself in the performance of the contract, and so continued until a short time before the date of the contract in suit.

By reason of the unusual conditions existing in Alaska, i. e., on account of severe weather and the absence of highways over which to carry the mails the claimant, as averred, was compelled to transport along the route at great expense a sufficient outfit or supply of food both for man and beast for one year, and to construct bridges across streams and build cabins and stables, all with the expectation of the continuance of the contract for the period of four years from July 1, 1906; that the discontinuance of the service prior thereto, to wit, September 30, 1908, with only one month's pay, involved him in great loss in excess of the amount so paid, besides the loss of profits which, he avers, he might have made by reason of his preparation and expenditures for the performance of the residue of the service.

The claimant contends that the postal laws and regulations referred to do not apply to the transportation of mails in Alaska, al-

though the claimant, by the terms of his contract, obligated himself to comply therewith in the performance of the service.

The language of the contract with Crittenden (which contract the claimant obligated himself to carry out) is substantially the language of the postal laws and regulations, and, therefore, to sustain the contention of the claimant the court, in addition to holding that the postal laws and regulations do not apply, would have to eliminate similar provisions from the contract.

That the Postmaster General had the authority to discontinue the service in whole or in part, both by the terms of the contract and the postal laws and regulations incorporated therein, there can be no question; and as the language both of the contracts and the postal laws relating to the authority of the Postmaster General to discontinue the service is free from ambiguity no interpretation thereof is permissible.

The claimant's contention that in the interpretation of any particular clause of a contract the court should examine and consider the entire contract is well founded; and if the provisions of the contract respecting the authority of the Postmaster General to discontinue the service were susceptible of interpretation we should, in view of the evident hardships imposed in this case, resolve the doubt in favor of the claimant. However, the difficulties in the way of performance of the contract, the court must presume, were taken into consideration by the contractor when he made his bid for the service. The real hardship imposed upon him was in the discontinuance of the service and the payment of only one month's extra pay. This course left the claimant with his equipment, consisting of stock, dogs, and provisions, on hand, remotely scattered, and deprived him of the profits which he claims would have accrued to him had he been permitted to continue the service until the end of the contract period.

34 In the case of *Slavens v. United States* (196 U. S., 229, 233-236), affirming this court (38 C. Cls., 574), the claimant contended that the total discontinuance of the service was essential to a termination of the contract; but in response to that contention the court said: "We cannot accede to this narrow construction of the powers given the Postmaster General by the terms of this contract. He is given general power to increase, decrease, or extend the service contracted for, without change of pay. Furthermore, whenever the public interests in his judgment require it, he may discontinue the entire service. We think the advertisement and the regulations under which this contract was made and the contract as entered into were intended to permit the Postmaster General, when in his judgment the public interest requires it, to terminate the contract, and if a service of a different character has become necessary in his opinion, to put an end to the former service upon the stipulated indemnity of one month's extra pay being given to the contractor. It is not reasonable to hold that the power given to the Postmaster General for the public interest can only be exercised when the mail service in the district is to be entirely abandoned." * * *

"The authority given to the Postmaster General is broad and com-

prehensive, requiring him to exercise his judgment to end the service, and thereby terminate the contract, whenever the public interest shall demand such a change. In that event the contractor takes the risk that the exercise of this authority might leave him only the indemnity stipulated for—one month's extra pay." * * *

"Our conclusion is that, acting in good faith, of which there is every presumption in favor of the conduct of so important a department of the Government, the Postmaster General may, as was done in this case, discontinue the service, and thereby put an end to the contract when the public interest, of which he is the sole judge, authorizes such action." (See also *Travis v. United States*, 196 U. S., 239.)

It will thus be seen that the decision of the Postmaster General, in the absence of fraud, not charged, to discontinue the service in whole or in part is not open to review by the courts.

The further contention of the claimant to the effect that because a portion of the service so discontinued was permitted to be performed by others without first giving the claimant an opportunity to perform was an arbitrary exercise of power is not well taken, as by the terms of the postal regulations recited the Postmaster General was empowered to "discontinue or curtail the service, in whole or in part, in order to place on the route superior service, or whenever the public interest, in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor one month's extra pay on the amount of service dispensed with."

From what we have said, notwithstanding the hardships imposed upon the claimant in discontinuing the service, the demurrer must be sustained, which is accordingly done, and the petition dismissed.

35

V. Judgment of the Court.

At a Court of Claims held in the City of Washington on the fourth day of December 1911, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendant and do order, adjudge and decree, that the demurrer be sustained and that the petition of the claimant, John Miller, be and the same is hereby dismissed.

BY THE COURT.

36

VI. Application for and Allowance of Appeal.

The claimant makes application for an appeal to the Supreme Court of the United States from the judgment heretofore rendered by this Court.

DUDLEY & MICHENER,
Attorneys for Claimant.

Filed January 16, 1912.

Ordered: That the above appeal be allowed as prayed for.
January 16, 1912.
By the Court.

STANTON J PEELE,
Chief Justice.

37

In the Court of Claims.

No. 30790.

JOHN MILLER
VS.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the Court; of the final judgment of the Court; of the application of the claimant for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 24th day of January, 1912.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

Endorsed on cover: File No. 23,034. Court of Claims. Term No. 533. John Miller, appellant, vs. The United States. Filed January 25th, 1912. File No. 23,034.